do not consider that a person could be found guilty under that section when the certificate given by him is produced in evidence unless he was aware of the purpose for which the certificate was required, and in the present case there is no evidence that the respondent was so aware. No offence was therefore disclosed under the second part of section 197.

On the above grounds the appeal is dismissed.

Appeal dismissed.

CHIA KHIN SZE v. THE MENTRI BESAR, STATE OF SELANGOR

[O. C. J. (Sutherland J.) April 11, 1958]

[K. L. — Originating Motion No. 6 of 1958]

Constitutional Law — Liberty of person — Right to counsel — Constitution of the Federation of Malaya, Art. 5(3) and (4) — Whether cl. (3) applies only to cases under the Criminal Procedure Code — Whether applies to cases arising under the Restricted Residence Enactment (Cap. 39) — Whether applies to cases arising from executive acts.

This was an application by a detainee under the Restricted Residence Enactment to be allowed representation by counsel and to call witnesses at an enquiry to be held under that Enactment. The respondent in exercise of the powers in section 2(i) of the Enactment had issued a warrant for the arrest and detention of the applicant, and he deemed a further enquiry to be necessary. The form of the further enquiry was one to be held in camera without the person concerned being represented by counsel.

The issue in this case was whether the Constitution gives a right to be defended by Counsel in such a case.

Held: (1) a right to be defended by counsel presupposes a right to be heard. In this case the respondent was under no obligation to hold an enquiry, therefore the applicant had no right to be heard, and he could not have the right to be defended by counsel;

(2) as the fundamental liberty under the Constitution Article 5 was intended to be merely declaratory of existing law, i.e., the law anterior to the Constitution, there was no right of representation by counsel in respect of an executive act;

(3) Article 5(4) of the Constitution is intended to apply to arrests under the Criminal Procedure Code and not to arrests under the Restricted Residence Enactment; similarly clause (3) of Article 5 of the Constitution does not apply to cases under the Restricted Residence Enactment.

[**Editorial Note:** See comment on this case at page xli **supra.**]

Case referred to:—

(1) *R. v. Inspector of Leman Street Police Station, ex parte Venicoff* (1920) 3 K.B. 72.

APPLICATION FOR MANDAMUS.

Cheah Theam Swee for the applicant.

P. G. Clough (Federal Counsel) for the respondent.

Sutherland J. : — This was an application to be allowed to be represented by Counsel and to call witnesses at the enquiry to be held under the Restricted Residence Enactment Cap. 39 as amended by the Restricted Residence (Amendment) Ordinance, 1948. In support of the application applicant affirmed that he was under detention with a view to an enquiry being held under the Restricted Residence Enactment. Permission for Counsel to represent applicant at the enquiry has been refused. Applicant does not know how to conduct the enquiry on his own behalf and he prayed that in the interests of Justice he be allowed to be represented by Counsel and to call witnesses at the enquiry.

Respondent, in reply, affirmed that in exercise of the powers in sub-section (i) of section 2 of the Enactment he issued a warrant for the arrest and detention of the applicant. Respondent deems a further enquiry to be necessary and an officer was appointed to hold it. The form of the further enquiry respondent deems necessary is an enquiry held in camera without the person concerned being represented by Counsel. Respondent prayed dismissal of the application with costs.

The foregoing represents the formal part of the application.

At the hearing Counsel for applicant referred to section 44 of the Specific Relief (Malay States) Ordinance, 1950 and Federal Counsel who represented the respondent conceded that this section applied. Mandamus, as such, was accordingly not in issue between the parties. Applicant's Counsel stated that the only issue was whether applicant should be represented by Counsel at the enquiry. In section 2 of the Enactment there was no express denial of the right to Counsel.

Counsel referred to Article 4 of the Constitution of the Federation of Malaya whereby the Constitution is the supreme law of the Federation. He then went on to cite Article 5(3) of the Constitution, and this, it appeared to me, was the strongest limb of his argument. As it should be read in its context, I set out Article 5(3), (4) & (5) :—

"5. (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

"(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within 24 hours (excluding the time of any necessary journey) be produced before a Magistrate and shall not be further detained in custody without the Magistrate's authority.

"(5) Clauses (3) and (4) do not apply to an enemy alien."

Counsel anticipated Federal Counsel's approach to the matter and he said it might be argued that

Article 5(3) of the Constitution does not apply to the Restricted Residence Enactment — it applies only to arrests under the Criminal Procedure Code, and, in my view, Counsel was here putting his finger on the crucial point for decision. In passing, I would refer to section 28 of the Criminal Procedure Code which states that a police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions in the Code as to bail or previous release take or send the person arrested before a Magistrate's Court. No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable. Such period shall not in the absence or after the expiry of the special order of a Magistrate under section 117 exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

It appears that there is an undoubted similarity between Article 5(4) of the Constitution and section 28 of the Criminal Procedure Code and in my view Article 5(4) of the Constitution is intended to apply to arrests under the Criminal Procedure Code and not to arrests under the Restricted Residence Enactment. The point for decision is whether Article 5(3) similarly refers to arrests under the Criminal Procedure Code and not to arrests under the Restricted Residence Enactment. I would also mention section 255 of the Criminal Procedure Code which gives a person accused before a criminal Court the right to be defended by an advocate.

Counsel urged that the refusal of representation by the Mentri Besar appeared inconsistent with the Federal Constitution. Here again, in my view, he was getting very close to the heart of the matter, which was whether Article 5(3) of the Constitution applies to the Restricted Residence Enactment.

Counsel, of course, agreed that Ministers have power to make administrative decisions and conceded that insofar as administrative powers are concerned they are against applicant's case. There are occasions when an administrative officer is given power to decide at his absolute discretion without the intervention of any judicial element. Counsel cited *Halsbury,* third edition, volume 7, page 198 in support of the right of the subject to have a dispute which is brought before a judicial tribunal or officer tried in accordance with the principle that he is to be given a reasonable opportunity of putting forward his case. It is to be noted that this deals with disputes brought before a judicial tribunal or officer.

Counsel referred to the *Modern Law Review* of January 1958, volume 21. I. at page 73 dealing with the Report by the Committee on Administrative Tribunals and Enquiries. The right of representation before administrative tribunals should be curtailed only in the most exceptional circumstances. Government accepted this but considered that the local service committees under the National Health Service might be a special case. From this is might be deduced that in England the right to representation before an administrative tribunal is not an absolute one, but counsel urged that representation should not be denied when fundamental rights of the subject are at stake.

Federal Counsel, in opening, stated that it was not intended to refuse to allow witnesses to be called and both Counsel agreed that under these circumstances the only issue was that of representation. Federal Counsel submitted that the Mentri Besar in this context is performing an entirely executive function and I may say at the outset, and after having considered the authorities, in my view it is correct that the Mentri Besar is exercising an executive power. Federal Counsel went on to refer to Federated Malay States Gazette of January 13, 1933. No. 16 to demonstrate that the Enactment was designed in the interest of public order. Counsel pointed out that it was not the Mentri Besar but the Ruler who made the order under section 2(ii) of the Enactment. The Mentri Besar does not act in a judicial but in an executive capacity. The Mentri Besar has a discretion as to whether he will hold a further enquiry at all and this significant aspect of the matter was common ground between the parties and will be considered at a later stage of this judgment. Federal Counsel went further and said that the Mentri Besar had an unconditional discretion to decide the nature of the enquiry if one was held.

Federal Counsel cited the *King v. The Inspector of Leman Street Police Station, ex parte Venicoff*[1] as authority that Article 12 Paragraph 1 of the Aliens Orders, 1919, which empowers the Secretary of State "if he deems it to be conducive to the public good" to make a detention order against an alien, is not *ultra vires.* In acting under the Article the Secretary of State is not a judicial but is an executive officer and is therefore not bound to hold an enquiry or give the person against whom he proposes to make a detention order the opportunity of being heard.

On the subject of the Constitution, Federal Counsel referred to Article 4(1) and emphasised that it was any law passed after Merdeka Day which was inconsistent with the Constitution, which was void to the extent of the inconsistency. He also referred to the definition of "Federal law" in section 160 of the Constitution, to Article 75, and to the 9th schedule

list 1, 3(c) of the Constitution and deduced that the Restriction of Residence law is Federal law.

Federal Counsel urged that Article 5(3) presupposes peril on trial.

He referred to the Report of he Federation of Malaya Constitutional Commission, 1957. At page 70, under the heading "Fundamental Rights," it states :—

"The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution."

From this passage I take it that Federal Counsel inferred that the fundamental liberties guaranteed in Article 5(3) were, before Merdeka Day, operative throughout Malaya and that therefore clause (3) referred to arrests under the Criminal Procedure Code and not to arrests under the Restriction of Residence Enactment, there being no right of representation under the Restricted Residence Enactment before Merdeka Day. Put in another way, Article 5(3) effected no change in the law. I remind myself that the Constitution should be construed according to its wording.

Counsel stressed that there had been no question of denying written representation even through Counsel.

In my view this Originating Motion condenses into whether, when the Constitution, Article 5(3), says a person arrested shall be allowed to be defended by a legal practitioner, it refers to persons arrested under the Restricted Residence Enactment.

I have given this case anxious consideration. I am in no doubt that, as indicated by the English cases which were cited, the Mentri Besar's action is an executive and not a judicial act, and that apart from Article 5(3) of the Constitution there would be no right of representation by a legal practitioner in this case. Does, then, the Constitution introduce something new? Or was it merely affirming the existing position?

In considering Article 5(3) I think it should be read in its context and that particular notice should be taken of Article 5(4). It opens in terms similar to Article 5(3) : "Where a person is arrested," and it appears to me that Article 5(3) and Article 5(4) may be intended to apply to the same person. But Article 5(4) appears to apply, not to cases under the Restricted Residence Enactment, but to cases under the Criminal Procedure Code. A comparison with section 28 of the Criminal Procedure Code already referred to discloses the similarity between Article 5(4) and section 28 of the Criminal Procedure Code. This being so, is it likely that Article 5(3) applies to cases under the Restricted Residence Enactment either? Is it not more likely that Article 5(3) of the Constitution applies to arrests under the Criminal Procedure Code and not to executive acts? Put in another way, does Article 5(3) apply to this case? If it does, Article 5(4) would also probably apply to this case; but as this case is based on an executive act, Article 5(4) would not appear to apply to it, importing as it does into the matter a Magistrate's authority; therefore can Article 5(3) apply either?

Further, in my view, Article 5, as a fundamental liberty, was intended to be merely declaratory of existing law and I am in no doubt whatever that under existing law, that is, the law anterior to the Constitution, there was no right of representation by Counsel in respect of an executive act. There is a sharp distinction drawn in the books between the implications of an executive and of a judicial act.

Another instance of an executive as opposed to a judicial act is the making of a detention order under Regulation 17 of the Emergency Regulations, 1951. Here, also, there is, by Regulation 17(4), a right to be represented by Counsel only by leave.

In any event, in his reply, applicant's Counsel conceded that the Mentri Besar is under no obligation to hold enquiry. Here, it appeared to me that the very marrow of the case had been reached. As Counsel for applicant conceded that the Mentri Besar is under no obligation to hold enquiry at all, it followed, in my humble view, that applicant had no right to this enquiry. This being so, how can he have a right to be defended by a legal practitioner? A right to be defended by a legal practitioner presupposes a right (not an indulgence) to be heard, which in this case does not exist. Therefore, applicant having no right to be heard, can have no right to be defended by a legal practitioner.

If the Mentri Besar holds no enquiry, as applicant's Counsel concedes he is at liberty to do, where is applicant's alleged fundamental liberty to be defended by a legal practitioner in this case? It does not exist. This indicates that Article 5(3) does not apply to cases under the Restricted Residence Enactment. A right to be defended by a legal practitioner presupposes a right to be heard. Such latter right, *ex consessu,* does not exist in this case. Therefore there can be no right to be defended by a legal practitioner in this case. This, by itself, and irrespective of all other considerations, is fatal to *mandamus* in this case.

I have arrived at the foregoing as a clear conclusion, and I accordingly dismiss the application.

Application dismissed.

Solicitors: *Cheah Theam Swee & Co.*